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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/725,251

12/01/2003

Robert Jason Vickers

P146

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03/06/2008

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EXAMINER

ISSAC, ROY P

ART UNIT

PAPER NUMBER

1623

MAIL DATE

DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/725,251	Applicant(s) VICKERS ET AL.	
	Examiner ROY P. ISSAC	Art Unit 1623	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 9-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

This Office Action is in response to Applicant's amendment/ remarks/ response filed 12/17/07, wherein claim 1 has been amended.

Rejections Withdrawn

The terminal disclaimer filed on 12/17/07 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of Application No. 10/724,839, and Application No. 10/725,248 has been reviewed and is accepted. The terminal disclaimer has been recorded.

The terminal disclaimer filed on 12/17/07 with respect to the rejection of claims 1-8 made under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 18-31 of U. S. Application No. 10/724,839 and over claims 1-36 of U.S. Application No. 10/725,248 of record in the previous Office Action dated 8/15/07, has been considered and found persuasive. Therefore, this obviousness-type double patenting rejection is withdrawn.

The following are new or modified rejections necessitated by Applicant's amendment filed 12/17/07, wherein the limitations in pending claim 1 as amended now have been changed and claims 2-8 depend from claim 1. The limitations in the amended claims have been changed and the breadth and scope of those claims have been changed. Therefore, rejections from the previous Office Action, mailed 8/15/07, have been modified and are listed below.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this

Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Howard et. al. (Nutrition Research, 2000, 20(10), 1473-1484; Of record).

Howard et. al. discloses feeding dogs that contain fructooligosaccharides (FOS). (Abstract). The FOS used was Nutraflora at 1.5%. (Table 1, Page 1474, and Page 1474, last paragraph). Note that Nutraflora is described in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose. (Specification, Page 4, second paragraph). Note that the range claimed herein “about 0.19%” and “about 0.18%” is considered to included 1.5%. Howard describes that the incorporation of fermentable fiber into diet has several beneficial effects including, reducing colonic histopathologies, beneficially altering the intestinal microflora and reducing blood urea and renal N excretion. (Page 1473, introduction). Howard discloses that dry matter intake was reduced with FOS containing diets. These effects are expected to improve the physical activity performance of a companion animal.

Response to Arguments

Applicant's arguments filed 12/17/07 have been fully considered but they are not persuasive. Applicants argue that the range disclosed in Howard, 1.5% is greater than the claimed ranges of "about 0.19%" and "about 0.18%" herein. The claimed ranges herein are greater than the absolute terms of 0.19% and 0.18%. These numbers are modified by "about" which one of ordinary skill in the art to include 1.5%, which is only 1.32 percentage point higher than the absolute number 0.19% and 0.18%. As such the rejection under section 102 is still deemed proper and is adhered to.

Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Reinhart et. al. (U.S. Patent No. 5,776,524; Of record).

Reinhart et. al. discloses the use of 0.2 to 1.5% weight percent of fructooligosaccharide in pet food. (Column 1, lines 50-55). Reinhart et. al. further discloses Nutraflora as a commercially available fructooligosaccharide. (Column 2, lines 35-40). Note that Nutraflora is described in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose. (Specification, Page 4, second paragraph). Reinhart et. al. further exemplify the use of 1.0% fructooligosaccharide with other fiber sources such as rice, corn, and beet pulp. (Column 3, Table 1). Note that "about 0.2%" and "about 0.18%" are deemed to include concentrations 0.2% and 1.0% disclosed in Reinhart et al. As such claims herein are deemed anticipated by Reinhart et. al.

Response to Arguments

Applicant's arguments filed 12/17/07 have been fully considered but they are not persuasive. Applicants argue that the range disclosed in Reinhart, "about 0.2 to 1.5%" is greater than the claimed ranges of "about 0.19%" and "about 0.18%" herein. The claimed ranges herein are greater than the absolute terms of 0.19% and 0.18%. These numbers are modified by "about" which one of ordinary skill in the art to include the lower ranges of "about 0.2%" reported in Reinhart. As such the rejection under section 102 is still deemed proper and is adhered to.

Claims 1-3 and 5-6 are rejected under 35 U.S.C. 102(b) as being anticipated by Houdijk et. al. (Livestock production science, 73, 2002, 175-184; Of record).

Houdijk et. al. discloses the use of 7.5-15g/kg (0.75-1.5%) fructooligosaccharides, Raftilose P95 in feeds for pigs. (Abstract). Note that the range discloses 0.75% to 1.5% is considered within the "about 0.18%" claimed herein. Houdijk further discloses a sample composition as sample diet. (Table 1). Corn and soy oil, both considered sources of fiber are included in the sample diet. Additional protein sources are disclosed such as casein, fish meal, and animal meal. Note that the recitation "companion animal composition" in the preamble is considered an intended use of the composition and is not considered to be further limiting.

Response to Arguments

Applicant's arguments filed 12/17/07 have been fully considered but they are not persuasive. Applicants argue that the range disclosed in Houdijk, 0.75% to 1.5% is greater than the claimed ranges of "about 0.19%" and "about 0.18%" herein. The claimed ranges herein are greater than the absolute terms of 0.19% and 0.18%. These numbers are modified by "about" which one of ordinary skill in the art to include 0.75%, which is only less than one percentage point higher than the absolute number 0.19% and 0.18%. As such the rejection under section 102 is still deemed proper and is adhered to.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Houdijk et. al. (Livestock production science, 73, 2002, 175-184; Of record). In view of Howard et. al. (Nutrition Research, 2000, 20(10), 1473-1484; Of record).

Houdijk et. al. discloses the use of 7.5-15g/kg (0.75-1.5%) fructooligosaccharides, Raftilose P95 in feeds for pigs. (Abstract). Note that the range discloses 0.75% to 1.5% is considered within the "about 0.18%" claimed

Art Unit: 1623

herein. Houdijk et. al. notes that fructooligosaccharides are considered as prebiotics and are used as additives in animal feedstuffs. Houdijk further discloses a sample composition as sample diet. (Table 1).

Houdijk et. al. does not expressly disclose a protein source selected from beef, pork, lamp, poultry, fish, or vegetable and mixtures thereof.

Howard et. al. discloses feeding dogs that contain fructooligosaccharides (FOS). (Abstract). The FOS used was Nutraflora at 1.5%. (Table 1, Page 1474, and Page 1474, last paragraph). Note that Nutraflora is described in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose. (Specification, Page 4, second paragraph). Howard describes that the incorporation of fermentable fiber into diet has several beneficial effects including, reducing colonic histopathologies, beneficially altering the intestinal microflora and reducing blood urea and renal N excretion. (Page 1473, introduction). Howard discloses that dry matter intake was reduced with FOS containing diets. These effects are expected to improve the physical activity performance of a companion animal.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to prepare a companion animal composition comprising about 0.19% or about 0.18% short chain oligofructose with additional fiber source as well as protein source such as poultry or chicken liver meal. It is considered well within the basic skills of one of ordinary skill in the art to substitute casein, fish meal or animal meal with beef, pork, lamp, poultry, fish or vegetable as a protein source in a companion animal composition. Furthermore,

Art Unit: 1623

Houdijk et. al. discloses the inclusion of protein sources in animal feed composition and Howard discloses several protein sources in similar animal feed composition.

One of ordinary skill in the art would have reasonably expected that the use of a protein source such as poultry or chicken liver would have substantially similar or better beneficial effects.

Thus the claimed invention as a whole is clearly prima facie obvious over the combined teachings of the prior art.

Response to Arguments

Applicant's arguments filed 12/17/07 have been fully considered but they are not persuasive. Applicants argue that the range disclosed in Houdijk, 0.75% to 1.5% is greater than the claimed ranges of "about 0.19%" and "about 0.18%" herein. The claimed ranges herein are greater than the absolute terms of 0.19% and 0.18%. These numbers are modified by "about" which one of ordinary skill in the art to include 0.75%, which is only less than one percentage point higher than the absolute number 0.19% and 0.18%. Furthermore, determining the optimal concentration range for the particular compounds is considered well within the competence level of an ordinary skilled artisan in pharmacological science, involving merely routine skill in the art. It has been held that it is within the skill in the art to select optimal parameters, such as amounts of ingredients, in a composition in order to achieve a beneficial effect. See *In re Boesch*, 205 USPQ

Art Unit: 1623

215 (CCPA 1980). As such the rejection under section 103 is still deemed proper and is adhered to.

Conclusion

No claim is allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Art Unit: 1623

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Roy P. Issac whose telephone number is 571-272-2674. The examiner can normally be reached on 9:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia Anna Jiang can be reached on 571-272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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